No. 82-1665

IN THE

Supreme Court of the United States

October Term, 1982

ILLINOIS TOOL WORKS, INC.,

Petitioner,

vs.

GRIP-PAK, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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TABLE OF CONTENTS

	Page
Introduction	1
Statement of the Case	2
A. The Facts	2
B. The Prior State Court Litigation	5
C. The Proceedings Below	7
Reasons for Denying the Writ	9
I.	
Certiorari Should Be Denied Because the Seventh Circuit's Ruling Was Merely Advisory	9
II.	
Certiorari Should Also Be Denied Because Resolution of the Issues Raised in the Petition Will Not Be Dispositive of This Action	9
III.	
The Court of Appeals' Ruling on the "Sham Exception" Does Not Create Any Conflict	11
A. The Illinois State Action Is an Improper Lawsuit Brought as Part of a Pattern of Repetitive, Baseless Litigation	11
B. The Illinois Action Was Prosecuted in Furtherance of an Independent Antitrust Violation	14
IV.	
The Seventh Circuit's Decision That Respondent Was Denied Fundamental Due Process in Connection With the Malice Issue Is in Harmony With This Court's Decisions Relating to Both the Proper Application of Collateral Estoppel and the Full Faith and Credit Clause of the United States Constitution	19
Conclusion	21

TABLE OF AUTHORITIES

Cases	Page
Alexander v. National Farmers' Organization, 687 F.2d 1173 (8th Cir. 1982)	18, 19
Allen v. McCurry, 449 U.S. 90 (1980)	20
American Tobacco Co. v. United States, 328 U.S. 781 (1946)	15
Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981)	17
Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation, 402 U.S. 328 (1971)	20
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	5, 12, 13, 14
City of Gainsville v. Florida Power and Light Co., 488 F.Supp. 1258 (S.D. Fla. 1980)	14
City of Mishawaka v. American Electric Power Company, Inc., 616 F.2d 976 (7th Cir. 1980)	17
Clapper v. Original Tractor Cab Co., 270 F.2d 616 (7th Cir. 1959), cert. denied, 361 U.S. 967 (1960)	16
Clipper Express v. Rocky Mountain Motor Tariff, 674 F.2d 1252 (9th Cir. 1982)	17
Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983)	17
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	14
Dairy Foods, Inc. v. Dairy Maid Products Corp., 297 F.2d 805 (7th Cir. 1961)	16
Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386 (9th Cir. 1983)	17, 18
Grip-Pak, Inc. v. Illinois Tool Works, Inc. 1981-2 CCH Trade Cases, ¶64,331 (N.D. Ill. 1981)	7

Page

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 1982-1 CCH Trade Cases, ¶64,451 (N.D. Ill. 1981) 7

Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982) 8

Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) 10, 16

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) 5

Hydro-Tech Corp. v. Sunstrand Corp., 673 F.2d 1171 (10th Cir. 1982) 18

Illinois Tool Works, Inc. v. Rex L. Brunsing, 254 F.Supp. 281 (N.D. Cal. 1966), affirmed, 389 F.2d 38 (9th Cir. 1968) 3

ITW, Inc. v. Kovac, 43 Ill.App.3d 789, 357 N.E.2d 639 (1976) 4

Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 562 F.2d 365 (6th Cir. 1977) 16, 17

Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), cert. denied, 344 U.S. 837 (1952) ... 10, 15, 16

Kremer v. Chemical Construction Corporation, 102 S.Ct. 1897 (1982) 20, 21

Landmarks Holding Corp. v. Bermant, 664 F.2d 891 (2nd Cir. 1981) 13

Litton Systems, Inc. v. AT&T Co., 1982-3 CCH Trade Cases, ¶65,194 (2nd Cir. 1983) 13

Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963) 16

Montana v. United States, 440 U.S. 147 (1979) 20

New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1981) 13

Page

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 12, 13

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 20

Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993 (9th Cir.), cert. denied, 423 U.S. 831 (1975) 10, 16

United States v. Otter Tail Power Co., 360 F.Supp. 451 (D. Minn. 1973), aff'd mem. 417 U.S. 901 (1974) 12

United States v. Singer Mfg. Co., 374 U.S. 174 (1963) 10, 15

United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469 (5th Cir. 1982) 18

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977) 12, 15

Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) 5

Webb v. Utah Tour Brokers' Association, 568 F.2d 670 (10th Cir. 1977) 16

Constitution

United States Constitution Art. IV, Sec. 1 ..... 20, 21

United States Constitution, First Amendment . 12, 17, 18

United States Constitution, Fourteenth Amendment 19, 20, 21

Statutes

Clayton Act, Sec. 4 2

Clayton Act, Sec. 7 ..... 4, 11

United States Code, Title 28, Sec. 1738 20

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BRIEF FOR RESPONDENT IN OPPOSITION.

INTRODUCTION.

Petitioner has asked this Court to review an advisory opinion expressed in the Seventh Circuit's Decision in this matter. The Seventh Circuit held that the issue of petitioner's malice in bringing an earlier state court case was never litigated and determined such that collateral estoppel would apply. The Seventh Circuit then went on to give an advisory opinion "for the guidance of the parties and the District Court on remand." This advisory opinion is the subject of Illinois Tool Works' petition herein.

The main question petitioner presents for review, *i.e.*, whether a state action brought with probable cause, but with anti-competitive intent, could be an unlawful act under the antitrust laws, is not worthy of review for the following reasons:

1) The conclusion challenged by petitioner was nothing more than *obiter dictum* gratuitously offered by the Seventh

Circuit as an advisory opinion on an evidentiary issue for the guidance of both the parties and the Court upon remand;

2) Resolution of this hypothetical issue will not dispose of this case because respondent, in its Complaint, is relying upon two separate antitrust theories whose vitality was acknowledged by the Seventh Circuit, neither of which is challenged by petitioner herein; and,

3) There exists no conflict in the Circuits with respect to the hypothetical issue presented for review.

The second question presented for review, *i.e.*, whether a State Court finding could be denied full faith and credit, and, therefore, preclusive collateral estoppel effect in this action, challenges the Seventh Circuit's ruling that respondent was denied its constitutional right to due process because the State Court refused to permit any evidence to be introduced by respondent relating to the issue of malice.

STATEMENT OF THE CASE

A. The Facts.

Respondent, Grip-Pak, Inc., is a direct competitor of Petitioner, Illinois Tool Works, Inc., with respect to sales of plastic multi-pack carriers, which are devices used for holding together clusters of containers (primarily six-packs of cans and bottles). Petitioner, Illinois Tool Works, Inc., along with its licensee, Owens-Illinois, is the sole manufacturer and licensor of multi-pack carriers for bottles and cans and possesses 90% of the relevant market.

In its Complaint, respondent is seeking to recover damages, under §4 of the Clayton Act, because of the commission by Illinois Tool Works, and its co-conspirators, of a multi-faceted program to monopolize the plastic multi-pack carrier field.

Respondent's Complaint alleges the following factual components of petitioner's broad scheme to initially acquire,

and subsequently to maintain and further, its acknowledged monopoly in the plastic multi-pack carrier market:

1) Petitioner accumulated every patent remotely relating in any way to plastic multi-pack carriers, and the assembly machines for applying these carriers to cans and bottles.

2) Petitioner embarked upon a willful course of dissuading potential competitors from competing with it by threatening these would-be competitors with groundless patent infringement lawsuits unless they withdrew from the marketplace.

3) Petitioner instituted and maintained three separate baseless and groundless lawsuits in bad faith, not for the legitimate purpose of adjudicating a legal controversy, but, rather, for the ulterior and anti-competitive purpose of eliminating competition and maintaining its dominant share of the relevant market.

4) The first lawsuit instituted by petitioner in bad faith, was *Illinois Tool Works, Inc. v. Rex L. Brunsing*, 254 F. Supp. 281 (N.D. Cal. 1966), affirmed, 389 F.2d 38 (9th Cir. 1968).

5) The next competitor sued by petitioner was respondent herein, and its principal officers, in Illinois for theft of trade secrets and breach of confidential relationships.

6) This litigation was brought in bad faith, as part of a pattern of repetitive, baseless claims without probable cause, for an anti-competitive purpose.

7) The foregoing State Court litigation involved reprehensible and illegal conduct amounting to a misuse and corruption of the judicial process, *i.e.*, unethical lawyer conduct, including perjured testimony and prolonging the pendency of the case by taking frivolous appeals.

8) The Illinois Trial Court not only found that respondent's products were independently invented by respondent

and that neither of its principals used or disclosed any of petitioner's trade secrets or confidences, but, most significantly, that the double tube device shown in Figures 7 and 8 of petitioner's Ron Owen patent application was derived by petitioner and Ron Owen from respondent's own invention. The Trial Court's findings were affirmed by the Illinois Appellate Court. See, *ITW, Inc. v. Kovac*, 43 Ill. App. 3d 789, 357 N.E. 2d 639 (1976), leave to appeal denied.

9) After petitioner lost its appeal, it again sued respondent, and its principals, in France, once again falsely claiming that French patent applications filed by respondent, were misappropriated from petitioner.

10) Petitioner obtained the Ron Owen patent knowing that it was invalid because petitioner admitted at the Illinois trial, that Figures 7 and 8 of the Ron Owen patent application were never part of the original Ron Owen disclosure and, the Illinois State Court held that Figures 7 and 8 of the Ron Owen patent application were derived from respondent's Grip-Pak II invention by petitioner.

11) Petitioner caused patent interference proceedings to be declared between the Ron Owen patent it knows is invalid and respondent's Grip-Pak II patent applications, both in the United States and in Canada.

12) Petitioner engaged in price fixing conspiracies with its sole Hi-Cone licensee, Owens-Illinois, in order to maintain its monopoly and dominant market position in the relevant market.

13) Petitioner engaged in illegal tie-in arrangements and allocated and divided markets with its Hi-Cone licensee, Owens-Illinois; and,

14) Petitioner acquired a direct competitor, Pak-Lok, Inc., in violation of §7 of the Clayton Act.

The allegations contained in respondent's Complaint, summarized above, must, of course, be accepted as true for purposes of this Petition. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-175 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 739 (1976).

B. The Prior State Court Litigation.

At the conclusion of the Illinois State Court trade secret lawsuit, the State Court judge entered a finding that the case "was not malicious." [Finding #9].

During the course of the trial, Grip-Pak's counsel attempted to introduce evidence that petitioners' case was malicious. However, Judge Van Deusen ruled that the issue of malice had not been properly presented in Grip-Pak's counterclaim and that the counterclaim was, therefore, insufficient to support a claim for a finding of malice. Accordingly, Judge Van Deusen denied Grip-Pak the right to introduce *any evidence* in support of its improperly pleaded counterclaim.

Although Grip-Pak had included a request for a finding of malice in its requested relief, Judge Van Deusen ruled as follows in this regard:

> "The Court: I don't think you can make a cause of action out of your 'Wherefore' clause."

Accordingly, Judge Van Deusen neve permitted any evidence to be introduced by Grip-Pak in support of its allegation of malice. Indeed, ITW's lawyers argued strenuously in an effort to preclude any determination on the merits by asserting that the issue was not pleaded and, therefore, was not properly before the Court.

In ruling that the issue of malice had not been pleaded, was not before the Court and was therefore not an issue as

to which evidence would be accepted, Judge Van Deusen ruled as follows:

> "No, the Court is not going to permit it. The Court having read your counterclaim sees no basis, and the Court simply feels that trying to assert a charge of this nature at this time, in fairness to the counter-defendants [ITW], I would have to give them additional time to get ready on the charge, and I am not going to permit that."

Nevertheless, Judge Van Deusen entered a finding that the suit was "not malicious".

After ITW filed its Motion for Summary Judgment in this action, Grip-Pak sought a clarification of the foregoing proceedings before Judge Van Deusen and filed a Motion to Vacate Finding 9 relating to the issue of malice. In this regard, Judge Van Deusen ruled, in his Order of December 20, 1978, as follows:

> "The issue of malice was not actively raised during the course of the trial except in connection with an evidentiary ruling of the Court. During the course of making this ruling the Court held that the counterclaim was insufficient to support a claim for a malice finding, denied defendants' leave to amend their counterclaim and in substance held that under the pleadings a malice finding was not an issue."

Judge Van Deusen then held *only* that the Court possessed *subject matter jurisdiction* to rule upon the issue of malice, as follows:

> "The fact that the Court, during the course of the trial, refused to permit evidence to be introduced on said issue on the basis that the claim for malice was not properly presented in the counterclaim in no way affects the subject matter jurisdiction of this Court. Such

a ruling may well make the latter finding of the Court erroneous but would certainly not affect the Court's jurisdiction."

C. The Proceedings Below.

This case is over six years old and is still at the pleading stage with essentially no discovery having been conducted. No significant discovery has been accomplished because respondent has been subjected to a barrage of motions seeking to dismiss this obviously meritorious antitrust action.

Moreover, this case has had a rather extraordinary odyssey in the District Court below. Before discovery could get under way, petitioner filed its Motion for Summary Judgment and thereafter the matter was taken under submission by the District Court. For some inexplicable reason, petitioner's Motion for Summary Judgment was not promptly ruled upon by the District Court, and it languished under submission for over three years.

Suddenly, without notification to counsel, the action was transferred to Chief Judge Parsons, who, in a well-reasoned opinion, denied petitioner's Motion for Summary Judgment. See, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 1981-2 CCH Trade Cases, ¶64,331 (N.D. Ill. 1981).

Petitioner then filed a Motion for Reconsideration of its Motion for Summary Judgment on the collateral estoppel grounds, claiming that Judge Parsons had not specifically ruled upon that issue in his Order.

Following a hearing on another issue, not relevant to this Petition, the District Court granted Summary Judgment dismissing this action with prejudice. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 1982-1 CCH Trade Cases, ¶64,451 (N.D. Ill. 1981).

In a thorough and comprehensive Opinion, the Seventh Circuit Court of Appeals reversed the foregoing grant of

Summary Judgment, remanded the case for trial and reinstated respondent's Complaint. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982).

Although the Court of Appeals held "that the issue of malice was never litigated and determined in the sense relevant to collateral estoppel," it went further and elected to address the malicious prosecution, *Noerr-Pennington*, issue for the following reasons:

> "We think we should address this argument now for the guidance of the parties and the District Court on remand. If the argument is correct, there will be no need for the parties to introduce evidence on whether the State Court action was malicious. If it is incorrect, that issue may be dispositive." [*Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 at p. 470.]

The Court below then proceeded to conclude that the malice finding, even if it were entitled to collateral estoppel effect, would not be a bar to finding that petitioner's lawsuit against respondent was an unlawful act under Federal antitrust law. [App. A, p. 11].

REASONS FOR DENYING THE WRIT.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT'S RULING WAS MERELY ADVISORY.

Petitioner seeks interlocutory review of the Seventh Circuit's unanimous reversal of a Summary Judgment. However, the conclusion which petitioner wishes this Court to review is nothing more than *obiter dictum* which was volunteered gratuitously by the Court merely as an advisory Opinion for the guidance of the parties and the Court. This dictum was both superfluous and unnecessary, in light of the Seventh Circuit's holding that the issue of malice was never litigated and determined in the sense relevant to collateral estoppel because the Trial Court had prohibited Grip-Pak's counsel from introducing any evidence relating to the issue of malice.

In essence, petitioner seeks an advisory Opinion from this Court with respect to an advisory Opinion from the Seventh Circuit relating to an evidentiary issue, yet to be factually developed.

II.

CERTIORARI SHOULD ALSO BE DENIED BECAUSE RESOLUTION OF THE ISSUES RAISED IN THE PETITION WILL NOT BE DISPOSITIVE OF THIS ACTION.

Preliminarily, the Court must recognize that it could not dispose of this litigation by granting the Petition and deciding the two questions raised. When viewed against the Opinion below, the very first page of the Petition discloses that Grip-Pak's antitrust claim will remain viable irrespective of the outcome of any proceedings in this Court. Grip-Pak submits that it would be a waste of this Court's certiorari power to intervene in this six-year-old case, at the pleading stage, in order to render an advisory Opinion which would in no way be dispositive of the action.

In its Complaint, Grip-Pak has asserted two distinct grounds of antitrust liability, whose validity was recognized by the Seventh Circuit, neither of which is challenged herein. The first of these Doctrines, *i.e.*, the sham exception to the Noerr-Pennington Doctrine, holds that "a pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused." [App. A, p. 8]. Yet, in this Court, petitioner neither challenges the Seventh Circuit's holding relating to the sham litigation exception, nor the Court's holding that ". . . three improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak." [App. A, p. 10].

Petitioner also does not contest the second doctrine upon which respondent relies that litigation prosecuted in furtherance of an antitrust violation may itself constitute an independent violation of the antitrust laws. *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963). The Seventh Circuit specifically acknowledged the vitality of the principles articulated in *United States v. Singer Mfg. Co., supra,* by relying upon three precedents articulating this Doctrine: *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied,* 344 U.S. 837 (1952); *Rex Chainbelt, Inc. v. Harco Products, Inc.*, 512 F.2d 993 (9th Cir.), *cert. denied,* 423 U.S. 831 (1975); and *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1980).

Accordingly, irrespective of how this Court acts on the two questions raised by the Petition, a trial against petitioner on the sham litigation exception to the Noerr-Pennington Doctrine and the "overall scheme" theory, both of which have been approved by the Seventh Circuit and neither of which has been challenged herein, is certain.

Petitioner thus asks this Court to review part of this case now, and (presumably) it will ask the Court to review the balance later, after discovery and trial. Grip-Pak submits tha such piecemeal review of a single cause of action is unwise, unnecessary and wasteful of the Court's time and effort. Following discovery and trial, Petitioner may request the Court to review the same issues they present now (and any others that may arise), but, at that point in time the Court will have the benefit of concrete findings by the trier of fact and a fully developed record. That fully developed record will prove many other antitrust violations committed by petitioners, as pled by Grip-Pak. Petitioner has engaged in a program to eliminate Grip-Pak and other competitors through numerous predatory conduct. Pursuant to that scheme, petitioner has accumulated over a hundred and twenty (120) patents covering the multi-pack carrier field; has instituted additional proceedings against Grip-Pak in France and in the United States Patent Office; has pursued litigation against other competitors including Rex L. Brunsing; has acquired the Ron Owen patent with knowledge of its invalidity; has engaged in price-fixing conspiracies and market allocations with its Hi-Cone licensee Owens-Illinois; and has engaged in other ancillary and incidental antitrust violations, including tie-in arrangements, allocation of markets and territories, and an acquisition in violation of §7 of the Clayton Act. All of these practices inflicted substantial harm upon Grip-Pak and are the subject of Grip-Pak's damage claim in the Court below.

III.

THE COURT OF APPEALS' RULING ON THE "SHAM EXCEPTION" DOES NOT CREATE ANY CONFLICT.

A. The Illinois State Action Is an Improper Lawsuit Brought as Part of a Pattern of Repetitive, Baseless Litigation.

Petitioner asks this Court for an advisory Opinion as to whether under the Noerr-Pennington Doctrine a State Court action, brought with probable cause and not maliciously,

can be deprived of its First Amendment protection solely on the basis of the State Court Plaintiff's alleged anti-competitive intent. The issue framed by petitioner is merely hypothetical because Grip-Pak is alleging that the State Court action was brought without probable cause as part of a repetitive pattern of baseless litigation to directly interfere with the business relationships of a competitor.

This Court, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972), articulated the parameters of the sham litigation exception to the Noerr-Pennington Doctrine as follows:

> "Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. . . . There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. . . . One claim, which a Court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, . . ."

Again, this Court, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), reiterated that legal proceedings carrying the hallmark of insubstantial claims come within the sham litigation exception where their purpose is to suppress competition. See, also, *United States v. Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn. 1973), *aff'd mem.* 417 U.S. 901 (1974).

Again, this Court held, in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635, N.6 (1977), that *California*

Motor Transport and *Otter Tail* together "may be cited for the proposition that repetitive, sham litigation in State Courts may constitute an antitrust violation. . . ." Finally, this Court recently, in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1981), noted, at p. 110, N. 15, that "Dealers who press sham protests before the New Motor Vehicle Board for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suit under the federal antitrust laws." Consequently, since *Trucking Unlimited*, this Court has declared on numerous occasions that baseless court litigation prosecuted as it was here, for the purpose of delaying lawful competitive activity violates the Sherman Act.

Contrary to petitioner's assertion, Grip-Pak's Complaint alleges that the Illinois State action was, indeed, accompanied by illegal and reprehensible conduct that amounts to a misuse or corruption of the judicial process and thus falls squarely within the sham litigation exception to the Noerr-Pennington Doctrine as an illegal attempt to interfere directly with the business relationships of a competitor.

As noted above, Grip-Pak's Complaint alleges that during the course of the State Court trial petitioner engaged in "unethical lawyer conduct" which included, *inter alia*, perjury of witnesses. *Cf., Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2nd Cir. 1981); and, most recently, *Litton Systems, Inc. v. AT&T Co.*, 1982-3 CCH Trade Cases, ¶65,194 (2nd Cir. 1983).

The conclusion is inescapable, therefore, that based on the allegations contained in respondent's Complaint, it is entitled to prove that petitioner intended to harm respondent by misusing the adjudicatory process by *bringing* the Illinois lawsuit without regard or concern about the *result* of the litigation. In other words, respondent is entitled to establish that petitioner intended to hurt it not by getting a judgment

against it, which would be a proper objective, but just by the institution and maintenance of the lawsuit, regardless of its outcome. See, *City of Gainsville v. Florida Power and Light Co.*, 488 F. Supp. 1258, 1265-1266 (S.D. Fla. 1980) for one of the most cogent explanations of sham litigation.

B. The Illinois Action Was Prosecuted in Furtherance of an Independent Antitrust Violation.

The Seventh Circuit's advisory Opinion that even if the State Court's finding on malice were entitled to collateral estoppel effect in this litigation, that finding would not be a bar to finding that petitioner's lawsuit against Grip-Pak was an unlawful act under Federal antitrust law, is supported by a long line of cases emanating from both this Court and the various Courts of Appeal.

This Court has repeatedly observed that: ". . . acts which in themselves are legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

Again, this Court, in *Trucking Unlimited*, emphasized the existence of liability for antitrust violations, even though an integral part of the violation may involve otherwise legal and protected activity:

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. . . . First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful." 404 U.S. at 14-15.

The foregoing holding is a specific application of a fundamental tenet of antitrust law articulated by this Court in *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946):

> "It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."

This Court applied this fundamental antitrust doctrine in *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) holding that litigation prosecuted in furtherance of an antitrust violation may itself constitute an independent violation.

Most recently, Justice Stevens declared, in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, at p. 662 (1977), that:

> "The mere fact that the Illinois Courts concluded that petitioners' state law claim was *meritorious* does not disprove the existence of a serious Federal antitrust violation. For, if it did, invalid patents, price-fixing agreements, and other illegal covenants in restraint of trade would be enforceable in state courts no matter how blatant the violation of Federal law."

The various Circuit Courts have consistently adhered to the foregoing doctrine in numerous decisions, and, contrary to the intimations of petitioner, there is no conflict in the Circuits in this connection.

The following cases *all* hold that good faith, even successful litigation, brought in furtherance and as an integral part of an independent plan or program to violate the antitrust laws is not entitled to immunity:

Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952) [In *Kobe* a patentee

had engaged in a plan of monopolization identical to the one involved herein, by acquiring all present and future patents relevant to the industry, obtaining covenants not to compete from those from whom it purchased the patents, publicizing its infringement suits throughout the industry, and threatening suits against anyone trading with the alleged infringer];

Dairy Foods, Inc. v. Dairy Maid Products Corp., 297 F.2d 805 (7th Cir. 1961) [Infringement suit was brought as part of and in furtherance of a combination and conspiracy to violate the antitrust laws]. See, also, to the same effect, *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960);

Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963) [State trade secret action was brought in the State Court for the purpose of giving effect to an unlawful monopolistic scheme];

Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975) [Patent litigation was utilized to maintain an unlawful tying arrangement];

Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) [A patentee may incur antitrust liability under an overall scheme theory, but there was no record evidence supporting the existence of any overall scheme to restrain trade apart from the litigation];

Webb v. Utah Tour Brokers' Association, 568 F.2d 670 (10th Cir. 1977) [Antitrust liability attached to tour operators who utilized protests to the ICC as a means to further an illegal boycott];

Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 562 F.2d 365 (6th Cir. 1977) [Antitrust damages may in-

clude attorneys' fees and costs of defending an infringement suit where the real purpose of the action is to further an existing monopoly and eliminate the alleged infringer-defendant as a competitor];

City of Mishawaka v. American Electric Power Company, Inc., 616 F.2d 976 (7th Cir. 1980) [Plaintiff is entitled to recover, as part of their antitrust damages, litigation expenses incurred in litigating before the Federal Energy Regulatory Commission to prevent a utility from withdrawing its wholesale supply of electricity];

Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1358 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) [The Noerr-Pennington Doctrine does not extend First Amendment immunity to litigation which defendants filed with an illegal purpose where the defendants also committed specific acts other than those incidental to the normal use of the courts, directed at attaining the illegal objective];

Clipper Express v. Rocky Mountain Motor Tariff, 674 F.2d 1252, 1274-5 (9th Cir. 1982) [*Noerr* immunity does not attach for an overall and independent antitrust violation where the litigation was utilized to effectuate and further a conspiracy to fix prices and allocate the relevant market among the conspirators];

Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358, 1371 (5th Cir. 1983) [Good faith, even successful litigation, brought in furtherance of an "overall scheme" to violate the antitrust laws is not entitled to *Noerr* immunity where it is part and parcel of circumstances unlawful even apart from the litigation];

Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386 (9th Cir. 1983) [The allegations of the Complaint are sufficient to state a claim of abuse of judicial process on

the grounds that the lawsuit was instituted for an unlawful purpose and the defendants committed specific acts outside the judicial process in furtherance of that purpose]; and

United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469, 477 (5th Cir. 1982) [First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute].

Respondent has alleged the various factual components of an overall scheme to monopolize, the Illinois state trade secret action being merely a constituent element and an integral part of such program to monopolize.

None of the foregoing authorities (virtually all decided after *Noerr*) require proof that the litigation was brought in bad faith or without probable cause. It was enough that the defendants invoked the Court's processes for an unlawful purpose, *i.e.*, to enforce or further an independent violation of the antitrust laws. In each of the foregoing cases, the Circuit Court declared that litigation prosecuted in furtherance of an independent antitrust violation was actionable because it was an integral part of the violation which it was designed to enforce or further.

Petitioner's reliance upon *Hydro-Tech Corp. v. Sunstrand Corp.*, 673 F.2d 1171 (10th Cir. 1982), and *Alexander v. National Farmers' Organization*, 687 F.2d 1173 (8th Cir. 1982), Petition for *cert.* pending (DKT - 82-1324), is misplaced. In the former action plaintiff alleged nothing more than the filing of the trade secret lawsuit and did not allege any incidental or additional acts which the lawsuit was intended to enforce or further. The Tenth Circuit, in line with the foregoing case authorities, properly held, in footnote 8, at p. 1177, that: "such an antitrust complaint must include allegations of the specific activities, not protected under the

Noerr-Pennington Doctrine, which complainant contends have resulted in an abuse of judicial processes."

The latter case [*Alexander*] does not furnish any basis for accepting this Petition because the Eighth Circuit, consistent with this Court's cases, and the foregoing line of authorities, held [687 F.2d at p. 1196] that:

> "Exempt conduct may be considered, however, to the extent it tends to show the 'purpose or character' of other, non-exempt activity. *United Mine Workers v. Pennington, supra*, 381 U.S. at 671, N.3, 85 S.Ct. at 1594, N.3;"

Consequently, even if the Seventh Circuit in this action had afforded collateral estoppel effect to the malice finding of the State Court, that Illinois lawsuit possesses antitrust significance, even if petitioner prosecuted it with probable cause, because respondent is permitted to prove that the Illinois state case was brought to enforce or further an independent violation of the antitrust laws.

IV.

THE SEVENTH CIRCUIT'S DECISION THAT RESPONDENT WAS DENIED FUNDAMENTAL DUE PROCESS IN CONNECTION WITH THE MALICE ISSUE IS IN HARMONY WITH THIS COURT'S DECISIONS RELATING TO BOTH THE PROPER APPLICATION OF COLLATERAL ESTOPPEL AND THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court below held that the issue of malice was never litigated and determined in the sense relevant to collateral estoppel because respondent was deprived of its fundamental rights to due process under the Fourteenth Amendment to the U.S. Constitution in that respondent was not afforded a full and fair opportunity to litigate the malice issue. [App. A., pp. 3-6].

In its ruling vitiating the malice finding, the panel relied upon the State Court's subsequent post-trial Order where Judge Van Deusen ruled that the issue of malice was not actively raised during the course of the trial; that respondent's counterclaim was insufficient to support a claim for a finding of malice; that under the pleadings the malice finding was not an issue; most significantly, that the Court had refused to permit evidence to be introduced on the malice issue for the reason that the malice claim was not properly presented in the counterclaim; and, that respondent was denied leave to amend its counterclaim so as to properly allege malice.

This Court has repeatedly recognized that the judicially created Doctrine of Collateral Estoppel does *not* apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue. *Kremer v. Chemical Construction Corporation*, 102 S.Ct. 1897 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 328-9 (1971); *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). The Congressional mandate contained in 28 U.S.C. §1738, as well as the Constitution's Full Faith and Credit Clause, both require that the procedural requirements of the Fourteenth Amendment's due process clause be met in order for a finding to qualify for the full faith and credit guaranteed by Federal law. *Kremer v. Chemical Construction Corp.*, 102 S.Ct., *supra* at p. 1897; and a state finding wherein fundamental due process was not met can provide no constitutionally recognizable preclusion by virtue of the Full Faith and Credit Clause.

Accordingly, this Court's Decisions enforcing the Full Faith and Credit Clause of the Constitution, Article IV,

Section 1, suggest that what a fair and full opportunity to litigate entails is the procedural requirements of due process. *Kremer v. Chemical Construction Corp., supra,* at p. 1898, N. 24. The Court below was clearly correct in refusing to afford preclusive effect to the State Court's finding on malice because the Trial Court had refused to permit evidence to be introduced by respondent relating to the claim of malice, and thus plaintiff was precluded from presenting any evidence with respect to whether or not petitioner possessed probable cause to bring the prior State Court action.

Since respondent was not permitted to present any evidence with respect to the presence or absence of probable cause, it plainly was not afforded a full and fair opportunity, under this Court's decisions relating to the Fourteenth Amendment's due process clause, to litigate the issue of malice, and thus the Court below was clearly correct in refusing to give full faith and credit to the malice finding by the Illinois State Court.

CONCLUSION.

With respect to the issues they raise, petitioner is requesting advisory opinions on hypothetical facts not before the Court: This case involves more than a single groundless lawsuit; in fact three improper lawsuits are alleged to be part of petitioner's pattern of repetitive, baseless litigation; there is ample evidence that the foregoing litigation was baseless and meritless; the Illinois state action is alleged to have been instituted to enforce or further an independent antitrust violation; and, most significantly, the panels' ruling sought to be reviewed by petitioner is merely *obiter dictum,* which was gratuitously volunteered by the Court as an advisory Opinion for the guidance of the parties and the Dis-

trict Court upon remand on an evidentiary issue. For this and all of the other reasons stated above, the Petition for Writ of Certiorari should be denied.

DATED: May 9, 1983.

Respectfully submitted,

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KENDRICK, NETTER & BENNETT,

Of Counsel.